

# **TITLE 327 WATER POLLUTION CONTROL DIVISION**

## **Rule Information Sheet**

“Exceptional Use Waters” and Other Requirements under IC 13-18-3-2  
LSA Document #13-290

### **Overview**

Amends rules in Title 327 to repeal exceptional use water as required by IC 13-18-3-2 (Public Law 78-2009) and clarify special designations of waters.

### **Suggested Changes since Preliminary Adoption**

During board discussion at the preliminary adoption hearing on April 9, 2014, the board asked for references to the Water Pollution Control Board to be corrected to the Environmental Rules Board, and that has been done in the rule document for consideration of final adoption. The board also asked IDEM to review the definition of “endangered or threatened species” at 327 IAC 2-1-9 and determine whether it should be the same as the definition in the Antidegradation rule, 327 IAC 2-1.3. IDEM has reviewed all uses of the term in Title 327 and has decided to maintain the definition referencing the federal Endangered Species Act in 327 IAC 2-1-9 but include language referencing the definition found in the Antidegradation rule so that people are aware that there is a different definition. The reason for IDEM’s determination is provided in the Attachment to this Rule Information Sheet.

### **Affected Persons**

Any entity using or interested in waters of the state could be said to be affected by this rule. However, the effect is limited in so far that this rule is to exchange the use of one term (Exceptional Use Water) with another term (Outstanding State Resource Water) and to eliminate an existing rule requirement calling for rulemaking, which is no longer necessary due to statutory changes.

### **Reasons for the Rule**

This rulemaking updates existing rules to conform to state statute.

### **Economic Impact of the Rule**

This rulemaking to accomplish the revisions to Title 327 in accord with the statutes will result in no cost and no cost savings to regulated entities, the state, or local governments.

### **Scheduled Hearings**

First Public Hearing: April 9, 2014, at the Indiana Government Center South, 302 West Washington Street, Conference Center Room A, Indianapolis, Indiana.

Second Public Hearing: September 10, 2014, at the Indiana Government Center South, 302 West Washington Street, Conference Center Room A, Indianapolis, Indiana.

### **IDEM Contact**

Additional information regarding this rulemaking action can be obtained from MaryAnn Stevens, Rules Development Branch, Office of Legal Counsel, (317) 232-8635, (800) 451-6027 (in Indiana), or [mstevens@idem.in.gov](mailto:mstevens@idem.in.gov).

## Attachment

### **Rationale for Retaining the Simple, Existing (Endangered Species Act Listing) Definition of “Endangered or Threatened Species” in Rulemaking #13-290 for Exceptional Use Waters and Other Requirements under IC 13-18-3-2**

The intent of this rule revision is to incorporate the waters listed as exceptional use waters into the outstanding state resource water (OSRW) classification to achieve alignment with statute at IC 13-18-3-2 (u) that says, “Each exceptional use water (as defined in IC 13-11-2-72.5, before its repeal) designated by the board before June 1, 2009, becomes an outstanding state resource water on June 1, 2009, by operation of law.”

The existing rule language, which is not proposed to change, utilizes “rare or endangered species” as one factor that may be considered when designating an OSRW. The rule also notes that considerations are not limited to the factors listed.

*327 IAC 2-1-10 (e) Outstanding state resource water classifications shall be in accordance with IC 13-18-3-2(f) through IC 13-18-3-2(j) and may include, but are not limited to, factors such as any of the following:*

*(1) The presence of any of the following:*

*(A) A unique or exceptional habitat or species in the waterbody.*

*(B) A rare or endangered species in the waterbody.*

*(C) Exceptional aesthetic quality in the immediate environs of the waterbody.*

The statutory guidance regarding OSRW designations does not mention endangered species, but rather speaks more broadly to “unique or special ecological significance”.

#### *IC 13-18-3-2*

*(f) The board **may** designate a water body as an outstanding state resource water by rule if the board determines that the water body has a unique or special ecological, recreational, or aesthetic significance.*

*(g) Before the board may adopt a rule designating a water body as an outstanding state resource water, the board must consider the following:*

*(1) Economic impact analyses, presented by any interested party, taking into account future population and economic development growth.*

*(2) The biological criteria scores for the water body, using factors that consider fish communities, macro invertebrate communities, and chemical quality criteria using representative biological data from the water body under consideration.*

*(3) The level of current urban and agricultural development in the watershed.*

*(4) Whether the designation of the water body as an outstanding state resource water will have a significant adverse effect on future population, development, and economic growth in the watershed, if the water body is in a watershed that has more than three percent (3%) of its land in urban land uses or serves a municipality with a population greater than five thousand (5,000).*

*(5) Whether the designation of the water body as an outstanding state resource water is necessary to protect the unique or special ecological, recreational, or aesthetic significance of the water body.*

Alternatively, the statutory directives regarding antidegradation standards and implementation procedures do specifically include “threatened and endangered species” as a factor to consider in an antidegradation determination.

*IC 13-18-3-2*

*(s) Subject to subsection (t), the commissioner shall consider the following factors in determining whether a proposed discharge is necessary to accommodate important economic or social development in the area in which the waters are located under antidegradation standards and implementation procedures:*

- (1) Creation, expansion, or maintenance of employment.*
- (2) The unemployment rate.*
- (3) The median household income.*
- (4) The number of households below the poverty level.*
- (5) Community housing needs.*
- (6) Change in population.*
- (7) The impact on the community tax base.*
- (8) Provision of fire departments, schools, infrastructure, and other necessary public services.*
- (9) Correction of a public health, safety, or environmental problem.*
- (10) Production of goods and services that protect, enhance, or improve the overall quality of life and related research and development.*
- (11) The impact on the quality of life for residents in the area.*
- (12) The impact on the fishing, recreation, and tourism industries.*
- (13) The impact on threatened and endangered species.*
- (14) The impact on economic competitiveness.*
- (15) Demonstration by the permit applicant that the factors identified and reviewed under subdivisions (1) through (14) are necessary to accommodate important social or economic development despite the proposed significant lowering of water quality.*

During the rulemaking for the antidegradation standards and implementation procedures, IDEM received comments regarding the definition of “endangered species” contained in that rule. Robust discussions with both U.S. EPA and the stakeholder workgroup determined that, for antidegradation purposes, a broader definition of endangered species is appropriate. A thorough antidegradation review necessitates an evaluation of the impact on both federal and state threatened and endangered species when determining if a proposed discharge is necessary to accommodate important economic or social development.

As these discussions and decisions were had and made in the context of antidegradation determinations alone and, at that time, no consideration of a broader application of the antidegradation definition of “endangered species” was discussed, IDEM believes it is inappropriate and potentially inconsistent with statute to require the definition from the antidegradation rule to be used in the consideration of OSRW designations. Note, state endangered and threatened species still may be considered when appropriate.